IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CIVIL REVISION APPLICATION NO.75 OF 2005

Shri Waman Yallappa Kamble Applicant

Vs.

Shri Dilip B. Bansode & ors. Respondents

Mr.Sandesh D. Patil for applicant.
Mr.D.S.Joshi h/f. Mr.I.R.Kulkarni for Resp.No.1.

CORAM: B.H.MARLAPALLE,J.
July 18, 2005.

ORAL ORDER:

1. Heard Mr.Patil, the learned counsel for the applicant.

2. Rule. Mr.Joshi holding for Mr.Kulkarni waives service for the respondents. Rule is taken up for final hearing forthwith.

3. Regular Civil Suit No.504 of 1999 was filed by the present applicant-landlord for recovery of possession of the tenanted premises from the respondents. The said suit came to be decreed by the learned Civil Judge Junior Division, Thane vide judgment and order dated 3-11-1999. The decree holder filed Regular Civil Darkhast No.26 of 2000 in which notices were served on the respondents on 29-4-2000. At this stage the defendants challenged

the decree dated 3-11-1999 by filing the First Appeal and simultaneously applied to the learned Civil Judge Junior Division at Thane under Order IX Rule 13 of CPC for setting aside the ex-parte decree. The First Appeal was filed belatedly and hence Misc. Civil Application No.84 of 2000 was filed for condonation of delay. The said application was dismissed by the lower Appellate Court on 10-1-2002 and thus the First Appeal filed by the judgment debtors could not be entertained. The decree thus became final and thereafter the respondents sought to pursue the application for restoration filed before the trial Court under Order IX Rule 13 of CPC. By the impugned order dated 16/2/2002 the learned Jt.Civil Judge, Senior Division at Thane has overruled the objections raised by the plaintiff and allowed the Misc.Application No.25 of 2001 thereby setting aside the decree passed in R.C.S.No.504 of 1999 and restored the suit on its original file and number.

4. Mr.Patil, the learned counsel appearing for the applicant-plaintiff has relied upon a decision of a three-Judge bench of the Supreme Court in the case of Shyam Sunder Sarma v. Pannalal Jaiswal & ors. reported in **(2005) 5 ALL MR (S.C.) 152** in which the

judgment in the case of Rani Choudhury vs. Lt. Col. Suraj Jit Choudhury [(1982) 2 SCC 596] was referred to wherein the First Appeal was filed belatedly along with the application for condonation of delay and the separate application under Order IX Rule 13 of CPC was also filed. The application for condonation of delay was dismissed. The Supreme Court held that where there has been appeal against an ex-parte decree and the appeal has not been withdrawn by the appellant and had been disposed off on any ground, the application under Order IX Rule 13 of the Code would not lie and should not be entertained. The same view has been reiterated in Shyam Sunder Sarma's case as well. Though it was stated before the Apex Court that the decision in Rani Choudhury's case required reconsideration in Shyam Sunder Sarma's case, the request was turned down and the conclusions in para 16 read as under:

> "16. Thus, in the case on hand we find that the trial court, the appellate court and the High Court have rightly held that the petition under Order IX, Rule 13 of the Code would not lie in view of the filing of an appeal against the decree by the appellant and the dismissal of the appeal though for default, since a dismissal for default or on the ground of it being barred by limitation cannot be equated with a withdrawal of the appeal. Consequently, the decision of the High Court is affirmed and this appeal is dismissed."

5. The law laid down in Rani Choudhury's case (Supra) and reiterated in Shyam Sunder Sarma's case (Supra) is squarely applicable to the case at hand and, therefore, the view taken by the trial Court is unsustainable.

6. Hence this Civil Revision Application succeeds and the same is allowed by quashing and setting aside the impugned order dated 16-2/2--2 passed by the Jt.Civil Judge Senior Division at Thane. Misc.Application No.25 of 2001 filed for restoration before the trial Court is hereby dismissed. Rule is made absolute accordingly with no order as to costs.

(B.H.MARLAPALLE,J.)